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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ALLIED CENTRAL STORES, INC., *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

PERCY W. PHILLIPS
306 Southern Building
Washington, D. C. 20005
Attorney for Petitioner

IVINS, PHILLIPS & BARKER
Washington, D. C.
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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INTRODUCTION

Petitioner, Allied Central Stores, Inc., respectfully prays that this Court grant rehearing of its order of May 3, 1965 denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed on March 15, 1965.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

(1) At the time of this Court's order of May 3, 1965, there appeared to be no conflict of decisions at the court of appeals level on the questions sought to be reviewed. Since that time a direct and explicit conflict has appeared. On May 5, 1965, the Commerce Clearing House advanced sheets made the first publication of the decision of the U. S. Court of Appeals for the Ninth Circuit which reversed the Tax Court decision in *Arthur T. Beckett* v. *Commissioner,* 41 T.C. 386 (1963). The opinion of the Court of Appeals for the Ninth Circuit appears under the name *Maxwell Hardware Company* v. *Commissioner,* 65-1 U.S.T.C. ¶ 9332 (9th Cir. 1965). A copy of the opinion of the Court of Appeals is appended hereto.

In the *Maxwell Hardware Company* case, a corporation had incurred over $1,000,000 of operating losses during fiscal years ended January 31, 1951 through January 31, 1955. On October 18, 1954 two partners engaged in profitable real estate development activities entered into an agreement with Maxwell Hardware Company whereby a real estate department was established in the corporation to develop a subdivision, the funds therefor being furnished by the two partners through purchases of preferred stock in the corporation for an amount which was approximately two-fifths (2/5) of the then value of the common stock of Maxwell Hardware Company. The real estate department was operated independently of the other corporate business. The hardware business was discontinued. The corporation sought to offset its hardware losses of fiscal years 1951-1955 against the real estate development income for the years 1957-1960. The Tax Court

held that even though section 269 and section 382 of the Internal Revenue Code of 1954 were not applicable to the partial change of ownership and complete change of business on October 18, 1954, the Libson Shops doctrine barred use of the earlier hardware losses against the later real estate income. The Court of Appeals for the Ninth Circuit reversed the Tax Court and held that the 1951-1955 losses of the hardware business could be offset against the later income from the real estate business because the *Libson Shops* case does not apply under the 1954 Code.

In the *Maxwell Hardware Company* case, the taxpayer was attempting to carry over pre-1954 Code losses against post-1954 income. Section 172(g)(1) of the Internal Revenue Code of 1954 makes clear that the Internal Revenue Code of 1939 governs the years to which a pre-1954 net operating loss may be carried. The section under the Internal Revenue Code of 1939 which is involved is section 122. The *Libson Shops* doctrine has heretofore been thought by some, including the Internal Revenue Service, to be a broad and unrestricted construction of section 122. The Court of Appeals for the Ninth Circuit has now held that the *Libson Shops* interpretation of section 122 of the Internal Revenue Code of 1939 is restricted and in fact inapplicable where a single continuing corporation whose business changed completely but whose ownership changed only slightly is involved and where the year to which the loss is to be carried is a 1954 Code year.

This treatment of pre-1954 Code losses against post-1954 Code income from a different business is directly in conflict with the decision of the Court of Appeals for the Second Circuit in petitioner's case. It will be

recalled that petitioner seeks to offset net operating losses for its fiscal years ended January 31, 1951, 1952 and 1954 against its profits for 1955 and 1957.

(2) Not only is there a conflict now at the court of appeals level, but it appears that there is now more reason to believe that a conflict will materialize between the decision of the Court of Appeals for the Second Circuit in petitioner's case and the decision of the Court of Appeals for the Fifth Circuit in the appeal pending before that court from the district court decision in the case of *Jackson Oldsmobile, Inc.* v. *United States,* 237 F. Supp. 779 (M.D. Ga. 1964). As pointed out in our petition for certiorari, there are compelling arguments to support the decision of the District Court for the Middle District of Georgia. In view of the treatment of the *Libson Shops* doctrine by the Court of Appeals for the Ninth Circuit in the *Maxwell Hardware Company* case, it is now even more likely that the Court of Appeals for the Fifth Circuit will decide the *Jackson Oldsmobile, Inc.* case for the taxpayer. The Solicitor General has already acknowledged that the decision of the District Court for the Middle District of Georgia in the *Jackson Oldsmobile, Inc.* case is in direct conflict with the decision of the Court of Appeals for the Second Circuit in petitioner's case. The conflicts which are developing point to the importance and necessity for this Court to make an authoritative pronouncement on the scope of the *Libson Shops* doctrine.

CONCLUSION

It is now clear that a clarification of the application of the principle laid down by this Court in *Libson Shops* is badly needed. For the reasons set forth above and in the petition of writ of certiorari, it is respectfully urged that rehearing be granted and upon such rehearing a writ of certiorari issue to the Court of Appeals for the Second Circuit. If further conflict among the Courts of Appeals is thought necessary, at the very least it is respectfully urged that this Court's order denying petitioner's petition for writ of certiorari be withdrawn to await the outcome of the appeal in *Jackson Oldsmobile, Inc.*

Respectfully submitted,

PERCY W. PHILLIPS
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

PERCY W. PHILLIPS
Counsel for Petitioner